

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	Policy Branch	FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
EchoStar Satellite L.L.C. (f/k/a EchoStar Satellite Corporation)	International Bureau	
Application for Authority to Construct, Launch and Operate a Geostationary Satellite in the Fixed Satellite Service Using the Allotted Extended Ku-band Frequencies at the 101° W.L. Orbital Location	File Nos. SAT-LOA-20030827-00179 SAT-AMD-20031126-00343 Call Sign S2492	
)	

To: The International Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

EchoStar Satellite L.L.C. (“EchoStar”), formerly known as EchoStar Satellite Corporation, hereby files this Reply to the Opposition to Petition for Reconsideration submitted by Mobile Satellite Ventures Subsidiary LLC (“MSV”)¹ in the above-captioned matters.² As discussed below, the Bureau should not have dismissed the Application and Amendment because they are “substantially complete” and otherwise in accordance with the Commission’s Rules.

The Commission most recently affirmed that, under its “first-come-first-served” (“FCFS”) procedures, applicants for new space station licenses would be required to file

¹ See, Mobile Satellite Ventures Subsidiary LLC, Opposition to Petition for Reconsideration, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (Mar. 24, 2004) (“MSV Opposition”).

² See, Letter from Thomas S. Tycz, Chief, Satellite Division, Int’l. Bur., FCC, to David K. Moskowitz, EchoStar Satellite Corp., File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343 (Feb. 9, 2004) (“Dismissal Letter”).

“substantially complete” proposals.³ As interpreted by both the Commission and the courts, and as acknowledged by MSV,⁴ this standard does not require a satellite application to be “letter-perfect” when filed, so long as any errors in the application can be “resolved, confidently and reliably, drawing on the application as a whole,”⁵ and any defects can be cured “without injury to public or private interest.”⁶

The minor typographical errors and omissions that were identified by the Bureau in its *Dismissal Letter* are easily resolvable from an examination of the Application and Amendment as a whole and the limited amount of missing technical information prejudices no one. As discussed below, the Bureau has repeatedly sent applicants requests that they correct even comparatively more serious errors or omissions without dismissing their applications. The Bureau may not properly change this practice without prior notice of such a change.

Accordingly, the Application and Amendment should not have been summarily dismissed by the Bureau and should be reinstated *nunc pro tunc* in the Commission’s FCFS queue for satellite applications in order to avoid any prejudice to EchoStar.

³ See, Amendment of the Commission’s Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 10760, at ¶ 244 (2003) (“Satellite Licensing Order”).

⁴ See, *MSV Opposition*, at 5.

⁵ See, *Processing of FM and TV Broadcast Applications*, MM Docket No. 84-750, 50 Fed. Reg. 19936, 19946 (May 13, 1985) (“FM and TV Order”).

⁶ *Salzer v. FCC*, 778 F.2d 869, 872 n.7 (D.C. Cir. 1985).

I. THE BUREAU MUST REINSTATE ECHOSTAR'S APPLICATION AND AMENDMENT AS SUBSTANTIALLY COMPLETE

EchoStar's Application and Amendment clearly meet any reasonable interpretation of the "substantially complete" test for accepting and processing satellite applications. The Bureau does not have authority to change that test, and in any event a new letter-perfect standard would be an unsound change for the Commission to make, especially in connection with the FCFS context.

A. The Typographical Error Contained In The Frequency Table Within The Technical Annex of the Amendment Is Easily Resolvable On The Face Of The Application And Amendment

As noted in the *Petition*, the correct downlink frequency bands (10.7-10.75 GHz and 11.2-11.45 GHz) are mentioned no fewer than nine times in the Application and Amendment, whereas the clerical error which is the source of the noted internal inconsistency was mentioned only once in a Table in an Attachment to the Amendment.⁷ EchoStar also consistently referred to the "allotted" Ku-band at 101° W.L. throughout the narrative of its Application. Clearly, the incorrect reference to the "non-allotted" Ku-band frequencies in Table A.4-1 of the Technical Annex filed with the Amendment was the result of a typographical error in the reproduction of the table. This error is easily resolvable based on a review of the rest of the Application and Amendment.

MSV, in its Opposition, cites to the Common Carrier Bureau's *Mobile Phone* decision for the proposition that such internal inconsistencies are fatal to the application, but the current situation is readily distinguishable from that case.⁸ Here, the only inconsistency was

⁷ See, EchoStar Satellite L.L.C., *Petition for Reconsideration*, File Nos. SAT-LOA-20030827-00179, SAT-AMD-20031126-00343, at n.19 (Mar. 10, 2004) (*Petition*) .

⁸ In re Application of Mobile Phone of Texas, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd. 3459 (Common Carrier Bur., June 12, 1990) (*Mobile Phone*).

easily resolvable while the numerous inconsistencies present in *Mobile Phone* were not. While both the cover letter and accompanying FCC Form 401 in *Mobile Phone* made reference to certain frequencies, these references conflicted with those specified in the body of the applicant's application. Additionally, there were other inconsistencies within the engineering statements themselves. This inextricable web of conflicting information provided reasonable doubt as to which frequency bands were being requested by the applicant.

By contrast, in this case, EchoStar's request for frequencies and all relevant textual information within the Application and Amendment, with the exception of one instance in one technical table, refers to the proper frequency bands. Thus, it would be wrong to classify the correction of one typographical error as an amendment to change the frequencies requested in the pending application. This type of correction is not the type of "major amendment" envisioned by 47 C.F.R. § 25.116(b)(1), and only could have been classified as such in the case of *Mobile Phone* because of the repeated inconsistencies and genuine question as to the applicable frequency bands being requested by the applicant.

The decision in *Mobile Phone* is also distinguishable because in that case the amendment submitted to correct the numerous inconsistencies "created a new conflict with [a mutually exclusive] application that was not apparent at the time *Mobile Phone* filed its application."⁹ By contrast, in this case, the single inconsistency prejudiced no one.

Thus, MSV's reliance on *Mobile Phone* in its Opposition is misguided. The typographical error in this case can easily be "resolved, confidently and reliably, drawing on the application a whole."¹⁰

⁹ *Mobile Phone*, at ¶ 8.

¹⁰ *FM and TV Order*.

B. The Application Is Substantially Complete and EchoStar Should Be Afforded the Opportunity To Remedy the Stated Omission

The only other asserted deficiency in EchoStar's application was a failure to indicate which transponders are connected or switchable to which spot beams. As explained in the *Petition*, this type of minor omission does not render the application anything but substantially complete. This is so especially since the Commission had complete information about all the frequencies and all the beams proposed by EchoStar, and could therefore fully assess the interference risks of the proposed system based on the use of all the frequencies on all the beams. Failing to accept and continue to process the application on the grounds that such inconsequential technical information has been omitted would be tantamount to applying a "letter-perfect" standard -- something the courts, the Commission and MSV have recognized is not the applicable standard. Moreover, it is the type of omission that can easily be corrected by amendment without prejudice to the public, as explained below.

1. The International Bureau Routinely Issues Letters Requesting Omitted Information Without Dismissing Satellite Applications

The International Bureau routinely has issued requests for supplemental information to correct minor inconsistencies or missing data. For example, less than two months ago, the Bureau sent EchoStar a letter stating that EchoStar did not include certain information in its applications for authority to construct, launch, and operate direct broadcast satellites at the 86.5° W.L., 96.5° W.L., and 123.5° W.L. orbital locations.¹¹ Similarly, in *Loral Skynet*, the Bureau gave the applicant an opportunity to correct its incomplete application by providing

¹¹ See, Letter from Thomas S. Tycz, Chief, Satellite Division, Int'l. Bur., FCC, to David K. Moskowitz, EchoStar Satellite Corp. (Feb. 9, 2004).

additional technical and other information that was missing from its original application.¹² The Bureau further warned Loral Skynet at that time that failure to supplement its application with any of the required information would result in the application being dismissed without prejudice.¹³ Thus, it is by no means unusual for the Bureau to request missing information rather than dismiss incomplete applications.

2. The Public Would Not Be Prejudiced By Allowing EchoStar to Amend Its Application Without Dismissal

MSV's only argument as to why the public would be prejudiced is that "potential applicants were prejudiced because they were forced to consider whether to expend resources preparing an application for the 10.70-10.75 GHz band that might ultimately obtain only second-in-line status if EchoStar was ultimately deemed to have applied for these frequencies."¹⁴ This argument is flawed for three reasons.

First, it is always the case that an applicant would have to weigh whether to expend resources to apply for particular frequencies, because there could be competing applications with priority in the queue. Indeed, MSV could have spent the same effort in preparing its latest amendment only to find that someone else filed first. This is not the type of prejudicial effect imagined by the Commission and courts.

¹² See, Letter from William Howden, Chief, Satellite Division, Int'l. Bur., FCC, to Mr. Stan Edinger, Manager-Government Relations, Loral Skynet Network Services, Inc. (Dec. 11 2003) ("Loral Skynet"). Note that, in that case, Loral Skynet did not seize this opportunity and its application was then dismissed. *Id.*, ("Since the Applicant has not responded to our request for additional and missing information within the allotted 30 days, we dismiss the application as incomplete and thus unacceptable for filing.").

¹³ *Id.*

¹⁴ *MSV Opposition*, at 6-7.

Second, all public and private entities have been on notice since the filing of EchoStar’s Application that the frequency bands requested by EchoStar included all of the “allotted” 10.70-10.75 GHz and 11.20-11.45 GHz downlink bands, and did not include the “non-allotted” 10.9515-10.9785 GHz or 10.9615-10.9885 GHz bands. Similarly, the Amendment, on its face and as a whole requests only the “allotted” bands as well. Only one reference in a table to the technical annex contains an incorrect reference to “non-allotted” band frequencies. Any such minor inconsistencies cannot be sufficient to have an application dismissed. Otherwise, the standard being applied by the Bureau would have impermissibly shifted from substantially complete to a letter-perfect one.

Third, given that the correct frequencies were easily discernible on the face of the Application and Amendment taken as a whole, no public or private entity is harmed by permitting EchoStar to correct the error.

MSV also makes a one-sentence claim that it “would have been useful” to have information on which transponders will be connected to which spot beam. In fact, such information has no relevance to EchoStar’s sharing proposal which is based on spatial separation of the beams and not on which transponders were connected or switchable to which spot beams.

C. EVEN IF THE BUREAU COULD CHANGE THE APPLICABLE STANDARD, A “LETTER-PERFECT” STANDARD WOULD BE UNSOUND

While the Bureau is not empowered to establish a new letter-perfect standard without Commission authority, such a standard would also be misguided as a policy matter, especially in the context of the first-come-first-served procedure. First, the combination of requiring letter-perfection and a filing fee of nearly \$100,000 would deter satellite applications because of the increased risk of another party filing ahead of the applicant whose application is returned on a technicality. Second, if the letter-perfect standard were inappropriate in the

processing round context, when applicants had 30 or 60 days to prepare their applications, it is all the less appropriate in the first-come, first-served process, where the press of time is considerably greater. The additional urgency introduced by the new process, combined with a “letter-perfect” standard, would lead to more “errors” warranting dismissal, and create increased risk and uncertainty over priority rights, compared to the “substantially complete” standard that is now in force.

II. ECHOSTAR’S APPLICATION SHOULD BE REINSTATED *NUNC PRO TUNC*

MSV argues in the Opposition that any reinstatement should be “considered as filed at the time EchoStar files a further amendment specifying the frequencies it is requesting.”¹⁵ They base the entirety of this argument on the decision in *Mobile Phone* which characterized an amendment to the frequencies requested as a “major amendment” pursuant to 47 C.F.R. § 25.116(b).¹⁶ Such reliance, as explained above, is inappropriate. Whereas it was reasonable to characterize the amendment in *Mobile Phone* as major and thus adopt the new filing date, similar treatment is not appropriate in EchoStar’s case. This is because the specific frequencies requested by EchoStar are not ambiguous when the Application and Amendment are read together as a whole. Therefore, the Bureau should reinstate EchoStar’s application *nunc pro tunc*, with first-in-line priority for the 10.70-10.75 GHz and 13.15-13.20 GHz bands.

MSV argues that if the Bureau were to reinstate EchoStar’s Application and Amendment, then EchoStar should not assume first-in-line status with respect to the 250 MHz in each direction for which MSV was first-in-line prior to the *Dismissal Letter* and the amendment

¹⁵ *MSV Opposition*, at 8.

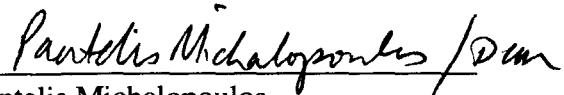
¹⁶ *Id.*

subsequently filed by MSV. EchoStar accepts that upon reinstatement of its application it should not assume first-in-line status for the frequencies originally requested by MSV.

III. CONCLUSION

For the reasons stated above, EchoStar respectfully requests that the Bureau reconsider its dismissal and reinstate EchoStar's Application and Amendment to their proper place in the satellite application processing queue. Once reinstated, EchoStar will promptly refile a further amendment to cure the minor defects identified by the Bureau in its *Dismissal Letter*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, hereby declare that copies of the foregoing Reply to Opposition to Petition for Reconsideration were sent this 5th day of April, 2004, by hand-delivery or U.S. Mail (indicated by *), to the following:

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